

Message Text

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ACTION AF-06

INFO OCT-01 ISO-00 L-03 OPIC-03 TRSE-00 COME-00 AID-05

FS-01 EB-07 ABF-01 OMB-01 XMB-02 /030 W

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R 201352Z FEB 76

FM AMEMBASSY NAIROBI

TO SECSTATE WASHDC 7892

INFO AMEMBASSY ABIDJAN

AMEMBASSY ADDIS ABABA

AMEMBASSY BAMAKO

AMEMBASSY LIBREVILLE

AMEMBASSY LOME

AMEMBASSY OUAGADOUGOU

AMEMBASSY YAOUNDE

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FOR AF/EPS DUNCAN

E.O. 11652: N/A

TAGS: CFED EINV OPIC KE

SUBJECT: TAW TRANSFERS

REF: (A) STATE 32314, (B) 75 NAIROBI 10918

1. SUMMARY: EMBASSY HAS STUDIED STRATEGY PROPOSED IN
REFTEL A FOR RE-OPENING USDO BANK ACCOUNTS TO TAW PAYMENTS
AND HAS SERIOUS RESERVATIONS ABOUT IT.

2. WE QUESTION OPIC'S INTERPRETATION OF ARTICLES 3 AND 4 OF
INVESTMENT GUARANTY AGREEMENT (IGA) AS PERMITTING TAW TO
TRANSFER LOCAL CURRENCY TO USDO ACCOUNTS QUOTE PURSUANT TO
AN INVESTMENT GUARANTY UNQUOTE. ACCORDING TO OUR FILES,
THE INVESTMENT GUARANTY ENJOYED BY TAW KENYA IS OPIC'S
POLITICAL RISK INVESTMENT INSURANCE, ISSUED UPON RECEIPT OF
FOREIGN GOVERNMENT APPROVAL. KENYAN FGA DATED OCT 25,
1971 ACCORDS TAW'S LOCAL INVESTMENT THE SPECIFIC RISK
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GUARANTEE. THE OPIC INSURANCE PROTECTS TAW'S KENYAN

INVESTMENTS AGAINST RISKS OF INCONVERTIBILITY; EXPROPRIATION; WAR, INSURRECTION, AND REVOLUTION. SHOULD TAW LOSE ALL OR A PORTION OF ITS KENYAN INVESTMENT FOR ANY OF THE ABOVE REASONS, THE U.S. KENYA IGA COULD BE INVOKED TO SECURE JUST COMPENSATION FROM GOK AND/OR A MEANS TO CONVERT THE INVESTOR'S LOCAL CURRENCY ASSETS. IN SUCH CIRCUMSTANCES THE EMBASSY COULD VERY WELL ACQUIRE LOCAL CURRENCY ON BEHALF OF THE INVESTOR OR OPIC AND EXERCISE ITS RIGHT UNDER THE IGA TO USE THE FUNDS TO DEFRAY IN-COUNTRY EXPENSES.

3. TAW'S CASE, ON THE OTHER HAND, APPEARS TO FALL OUTSIDE THE PARAMETERS OF IGA. AS FAR AS WE ARE AWARE, TAW KENYA'S FINANCIAL DIFFICULTIES CANNOT BE ATTRIBUTED TO EITHER INCONVERTIBILITY OR EXPROPRIATION OF ITS ASSETS IN KENYA, NOR TO ANY OTHER SITUATION WHICH WOULD TRIGGER THE IGA REMEDIES. IN SIMPLE TERMS, TAW INTERNATIONAL IS A BAD DEBT, AND WE QUESTION WHETHER KENYAN IGA GUARANTEES ARE THE PROPER VEHICLE FOR ITS CREDITORS TO ENFORCE OUTSTANDING PAYMENTS.

4. KENYAN CENTRAL BANK PROCEDURES DO, HOWEVER, PERMIT LOCALLY-BASED COMPANIES TO PURCHASE FOREIGN-EXCHANGE IN ORDER TO MEET DEBT OBLIGATIONS OVERSEAS. IN ADDITION, FOREIGN INVESTORS ARE ENTITLED TO PURCHASE FOREIGN CURRENCY TO REMIT PROFITS AND DIVIDENDS OUTSIDE KENYA. UNDER NORMAL CIRCUMSTANCES A COMPANY APPLIES FOR CB APPROVAL FOR SUCH REMITTANCES AND IS BOUND TO THE EXCHANGE LIMITS AND PAYMENT TIMING AUTHORIZED BY THE BANK. IN LIEU OF CIRCUITOUS AND QUESTIONABLE LEGAL PAYMENTS THROUGH THE USDO ACCOUNT WE RECOMMEND AGAIN THAT TAW OBTAIN ROUTINE AUTHORIZATION FOR ITS REMITTANCES DIRECTLY TO OPIC AND/OR THE CREDITORS COMMITTEE.

5. THE DECISION BY OPIC AND THE EMBASSY IN 1975 TO ACCEPT TAW REMITTANCES INTO THE LOCAL USDO ACCOUNT WAS BASED PRINCIPALLY ON THE HOPE THAT THIS PROCEDURE WOULD FACILITATE THE CASH FLOW BETWEEN A FINANCIALLY EMBARRASSED COMPANY AND OPIC. THE LATTER'S DESIRE TO EXERCISE MAXIMUM LEVERAGE ON COMPANY ASSETS ALSO INFLUENCED THE DECISION. AS REPORTED IN PREVIOUS COMMUNICATIONS LIMITED OFFICIAL USE

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THIS PROCEDURE WAS NEVER CLEARED WITH THE CENTRAL BANK AND IS, THEREFORE, IN CONTRAVENTION OF KENYAN EXCHANGE CONTROL REGULATIONS. WE DO NOT BELIEVE CB WILL NOW ISSUE STATEMENT, REQUESTED BY OPIC IN REFTEL A, WHICH GRANTS EX POST FACTO APPROVAL OF THESE DEPOSITS. REFTEL B OUTLINES EMBASSY'S REASONS FOR NOT APPROACHING CB TO OBTAIN SUCH A CLEARANCE.

6. WE PERCEIVE ADDITIONAL WEAKNESSES IN TACTICS RECOMMENDED IN REFTEL A. IF TAW'S DEFAULT ON PROMISSORY NOTES IS ATTRIBUTABLE TO FIRM'S ACTIVITIES THROUGHOUT AFRICA, WE ANTICIPATE GOK OBJECTIONS TO THE NAIROBI OFFICE ASSUMING CREDIT OBLIGATIONS BEYOND WHAT COULD REASONABLY BE ATTRIBUTABLE TO TAW'S LOCAL INTERESTS. FROM LOCAL REPORTS, TAW KENYA MAY BE ONE OF THE HEALTHIER OF THE COMPANY'S OFFICES. ANY PAYMENT FORMULA ESTABLISHED BY THE CREDITORS COMMITTEE, THEN, WHICH TAKES A RICHER OFFICE TO OFFSET LOSSES INCURRED IN OTHER COUNTRIES, WOULD MOST LIKELY BE UNACCEPTABLE TO GOK BANKING AUTHORITIES.

7. INVOKING IGA IN TAW'S CASE TO PERMIT LOCAL CURRENCY PAYMENTS TO THE EMBASSY WOULD ESTABLISH A PRECEDENT FOR MANY OTHER TRANSFERS IN PAYMENT OF DEBTS TO USG; E.G., OPIC INSURANCE PREMIUMS. ACCORDING TO OPIC'S REASONING THIS EXAMPLE ALSO CONSTITUTES FUNDS TRANSFERRED QUOTE PURSUANT TO AN INVESTMENT GUARANTEE UNQUOTE.

8. MOREOVER, REFTEL A INSTRUCTS EMBASSY TO TAKE PRECAUTIONS TO AVOID AROUSING ADVERSE REACTION AGAINST TAW. NO MATTER HOW ADROITLY THE EMBASSY APPROACHES GOK ON SUBJECT OF PAST AND FUTURE REMITTANCES, IT WILL BE DIFFICULT TO AVOID IMPLICIT CRITICISM OF FIRM'S MANAGEMENT AND FINANCIAL STATUS. EXPRESSION OF USG CONCERN, COUPLED WITH RECORD OF CASH FLOW FROM KENYA TO COMPANY CREDITORS, WILL PROVOKE OFFICIAL SUSPICION OF TAW'S CREDIT-WORTHINESS AND FUTURE VIABILITY IN KENYA.

9. IN CONCLUSION, WE FAIL TO SEE HOW EMBASSY CAN JUSTIFY A HIGH-LEVEL APPEAL TO GOK ON BASIS IGA INTERPRETATION OUTLINED IN REFTEL A AND UNTIL TAW HAS EXHAUSTED NORMAL INSTITUTIONAL CHANNELS FOR REMITTING FUNDS TO LIMITED OFFICIAL USE

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U.S. CREDITORS. EMBASSY BELIEVES THAT TAW-OPIC CONFRONTATION-- NOW ELEVATED TO LEVEL OF FORMAL LITIGATION-- SHOULD CONTINUE TO RECEIVE CLOSE AND BROAD ATTENTION FROM DEPARTMENT. POLICY IMPLICATIONS ARE FAR MORE EXTENSIVE THAN THE LEGAL. BEFORE WE MAKE APPROACH TO CENTRAL BANK REQUESTED REFTEL A, THEREFORE, WE REQUEST SPECIFIC INSTRUCTION FROM DEPARTMENT, THAT INSPITE OF EMBASSY OPINION GIVEN ABOVE, DEPARTMENT WISHES EMBASSY PROCEED ALONG LINES SUGGESTED BY OPIC.

DECON 2/20/80.
MARSHALL

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